

Midland King's Daughters Home and Local 79, Service Employees International Union, AFL-CIO.
Case 7-CA-43024(1)

October 26, 2000

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND LIEBMAN

Pursuant to a charge filed on May 4, 2000, the General Counsel of the National Labor Relations Board issued a complaint on May 24, 2000, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 7-RC-21726. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On June 20, 2000, the General Counsel filed a Motion for Summary Judgment. On June 21, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain and to furnish information that is relevant and necessary to the Union's role as the exclusive collective-bargaining representative, but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding.

To the extent that the Respondent argues, as it did in the underlying certification case, that the unit employees—registered and licensed practical nurses—are supervisors under the decisions of certain courts of appeals, we note that the Supreme Court has recently granted certiorari to resolve the conflict in the circuits over the meaning of the term "independent judgment" in Section 2(11), as well as the issue of which party has the burden of proof in establishing supervisory status. *NLRB v. Kentucky River Community Care*, 530 U.S. 1304 (2000).

Resolution of those issues will directly resolve the question whether the Regional Director applied a reasonable legal standard in determining that the nurses' routine exercise of professional or technical judgment in directing aides in delivering services in accordance with patient care plans did not make them supervisors. In our judgment, resolution of those issues also bears on the Respondent's contention that nurses have 2(11) authority

to send aides home for extreme and flagrant violations of its rules. Thus, resolution of the independent judgment issue bears on the question whether independent judgment is required in order to apply the Respondent's rules in such extreme situations. And, resolution of the burden of proof issue bears on the question whether the Respondent has established that sending home authority is 2(11) "discipline" where, as here, the record does not establish what, if any, adverse action would result in the event an aide were sent home by a nurse. Cf. *NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 581 (6th Cir. 1965) (authority of operators to call drivers in off the road not supervisory where conceded supervisors would decide whether to allow the driver to go back to work, and where there was no substantial period of suspension unless imposed by the conceded supervisors).

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a Michigan corporation, has been engaged in the operation of a nursing home and home for the aged services at its facility in Midland, Michigan. During the calendar year ending December 31, 1999, the Respondent, in conducting its business operations, received gross revenues in excess of \$500,000 and purchased and received goods valued in excess of \$10,000 directly from other enterprises located within the State of Michigan, each of which received goods and materials directly from points located outside the State of Michigan. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following an election, the Union was certified on February 18, 2000, as the exclusive collective-bargaining

representative of the employees in the following appropriate unit:

All full-time and regular part-time registered nurses and licensed practical nurses employed by the Employer at its facility located at 2410 Rodd Street, Midland, Michigan, but excluding all service employees, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since February 25, 2000, the Union has requested the Respondent to bargain and to furnish information that is necessary and relevant to its role as the collective-bargaining representative, and, since March 6, 2000, the Respondent has refused. Specifically, the complaint alleges that the Union requested the name, wage rate, job classification, and date of hire for each employee in the unit; copy of employee benefit plans, personnel policies and work rules; and job descriptions for each classification in the unit. The Union also requested information as to IRS Forms and Medicaid reimbursement. That request was not included in the General Counsel's complaint and we, therefore, do not pass on it here. We find that the refusals to furnish the information enumerated in the General Counsel's complaint constitute unlawful refusals to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing on and after March 6, 2000, to bargain with the Union as the exclusive collective-bargaining representative of the employees in the appropriate unit and to furnish the Union requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union with the information requested in its letter of February 25, 2000, with the exception of information as to IRS forms and Medicaid reimbursement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry*

Co., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Midland King's Daughters Home, Midland, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Local 79, Service Employees International Union, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time registered nurses and licensed practical nurses employed by the Employer at its facility located at 2410 Rodd Street, Midland, Michigan, but excluding all service employees, guards, and supervisors as defined in the Act.

(b) Furnish the Union with the following information requested in its letter of February 25, 2000: the name, wage rate, job classification, and date of hire for each employee in the unit; copy of employee benefit plans, personnel policies and work rules; and job descriptions for each classification in the unit.

(c) Within 14 days after service by the Region, post at its facility in Midland, Michigan, copies of the attached notice marked "Appendix."¹ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are cus-

¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

tomarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 6, 2000.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Local 79, Service Employees International Union, AFL-CIO, as the

exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time registered nurses and licensed practical nurses employed by us at our facility located at 2410 Rodd Street, Midland, Michigan, but excluding all service employees, guards, and supervisors as defined in the Act.

WE WILL furnish the Union with the following information requested in its letter of February 25, 2000: the name, wage rate, job classification, and date of hire for each employee in the unit; copy of employee benefit plans, personnel policies and work rules; and job descriptions for each classification in the unit.

MIDLAND KING'S DAUGHTERS HOME